IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 205 OF 2023

(Arising from the decision of the District Court of Kinondoni at Kinondoni Before (Hon. LYAMUYA A.M, PRM) dated on the 18th day of July 2022 in Criminal Case No.448 of 2020)

YOHANA DAUD .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

5th July & 30th August 2023

MWANGA, J.

The appellant, **YOHANA DAUD**, appeared before the Resident Magistrate Court of Kivukoni at Kinondoni on 23rd December 2020 to answer a charge of unnatural offence contrary to Section 154(1), (a) and (2) of the Penal Code, Cap. 16 [R.E 2019].

It was alleged that on the 19th of September 2020 at Morocco Tibaijuka Area within Kinondoni District in Dar es Salaam Region, the appellant did

have carnal knowledge of one Joshua Emmanuel, a boy of 11 years against the order of nature whose identity should be concealed.

He denied the charges. After his trial, he was found guilty as charged and convicted accordingly. Therefore, he was sentenced to serve life imprisonment.

Believing innocent, he lodged this appeal against conviction and sentence to this court on the following grounds:

1. That the learned trial court magistrate erred in law and fact in convicting the appellant based on the evidence of PW2 (victim), which was taken in contravention of section 127(2) of the Evidence Act, Cap. 6 R.E 2019, hence nullity.
2. That the learned trial court magistrate erred in law and fact by convicting the appellant based on a fatally defective charge sheet as the evidence of the prosecution adduced in court was at variance with the particulars of the offence regarding the alleged material date.

3. That the learned trial court magistrate erred in law and fact by convicting the appellant when the defence witnesses were never evaluated, analyzed, discussed, weighted, and considered sufficiently as required by law, the omission which resulted in serious error amounting to a miscarriage of justice and constituted a mistrial.
4. That the learned trial court magistrate erred in law and fact by convicting the appellant based on the appellant's cautioned statement, which was illegally or procedurally recorded and admitted in court, hence a nullity.
5. That the learned trial court magistrate erred in law and fact by convicting the appellant based on the oral evidence of PW4(Doctor) and PF3 Report where there was nothing to link the appellant with the charge at hand.
6. That the learned trial court magistrate erred in law and fact by convicting the appellant based on evidence of PW1 and PW2, which was incredible and unreliable to ground the appellant's conviction.
7. That the learned trial court magistrate erred in law and fact by convicting the appellant when the prosecution failed to prove its charge against the appellant beyond a reasonable doubt.

In the first ground of appeal, the appellant posed a challenge: the victim was not asked specific questions about whether he understood the nature of the oath. According to him, the victim only responded, "I have seen people taking the oath," meaning that the victim was only asked whether he had seen people taking the oath. The appellant cited the case of **Mkorongo James Versus Republic,** Criminal Appeal No. 498 of 2020, where the court indicted sample questions to be asked to a child under age, such as the age of the child, religion, and whether he understands the nature of the oath. The appellant, therefore, called this court to expunge the so-called illegally obtained evidence.

The Republic, represented by Ms. Nura Manja, disputed the appellant's submission on this ground of appeal. The learned State Attorney contended that the provision of Section 127 of the Evidence Act had been complied with. She referred to page 8 of the trial Court Proceedings to show that the victim's response was enough to show that there was a series of questions asked by the court to the satisfaction of the court that PW2 had sufficient intelligence to testify. Apart from that, the learned State Attorney argued that the victim promised to tell the Court the truth according to the requirement of the case of **Bayo Paschal@Banga@Bayo Sambiye**

Versus The Republic, Criminal Appeal No.113 of 2020; hence, this ground lacks merit and ought to be dismissed.

I have seriously considered the evidence on records and the submission of both parties. The disputed compliance provisions of Section 127(2) of the Evidence Act, Cap.6 R.E 2019, read:

> ***"Section 127(2) -*** *A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving Evidence,* ***promise to tell the truth and not to tell any lies."(emphasis is mine).***

The law above clearly states that the promise to tell the truth and not lies for a child of tender age is mandatory before receiving the evidence. The requirement of the promise to the Court to tell the truth and not tell lies comes in after the Court is satisfied that being a child of tender age does not understand the nature of an oath and the duty of telling the truth.

As rightly submitted by the Appellant, the trial magistrate can ask the witness of tender age such simplified questions that may be partial. Depending on the circumstances of the case to determine the test above. In the cited case of **Godfrey Wilson Versus R,** Criminal appeal No. 168 of 2018 (Unreported), it was held that:

"The trial magistrate ought to have required PW1 to promise Whether or not she would tell the truth and not lie. We say so because, section 127(2) as amended imperatively requires a child of a tender age to give a promise of telling the truth and Not telling lies before they testify in court. This is a condition precedent before reception of the evidence of a child of a tender age. The question, however, would be how to reach that stage. ***We think the trial magistrate or The judge can ask the witness of tender age, such. Simplified questions that may not be exhaustive depending on the circumstances of the case*** *as follows;*

1. *The age of the child*
2. *The religion which the child professes and whether he/she understands the nature of the oath.*
3. *Whether or not the child promises to tell the truth and not to tell lies. Thereafter,* ***upon making the promise, such promise must be recorded before the evidence is taken."***

The contested procedures on page 8 of the trial court proceedings clearly show all the requirements of the provision of section 27(2) of the

Evidence Act. First, the victim told the trial magistrate that he was 11. The other answers given by him to what appeared to be the questions posed are as follows:-

> ***"I am a Christian. I am in standard six at Sunrise Primary School. My school is at Mikocheni Chato Street-Dar es slaam. The headteacher is Mr. Vitalis. Class teacher is Mdam Mboka. There are 30 students in my class. My mam is a banker at TPB. She is a branch Manager. I have seen people taking an oath. People take an oath..."ili watu wajua kwamba unasema ukweli" Mungu anapenda tuseme ukweli". I promise to tell the truth to the court."***

If I may understand the appellant correctly, he is challenging the fact that he does not see any questions posed by the trial of the victim. His argument may be valid. However, the fact that there are answers from the victim and the same are recorded is enough to tell that there were questions posed to him and that the law was complied with.

As I have pointed out, all answers related to the three questions in this case regarding the victim's religion and age, promised to tell the truth,

his school details, his mother's job, and her title altogether. Most importantly, he assures the court that he knows the meaning of telling the truth by stating, " ***ili watu wajue kwamba unasema ukweli" Mungu anapenda tuseme ukweli". I promise to tell the truth to the court."***

Section 127(2) requirements, in this case, were met without any reservation.

In the second ground of appeal, the appellant submitted that throughout the trial, PW1 and PW2 maintained that the offence was committed on 14th October 2020. The appellant also challenged the evidence of PW5, who said that the crime was committed on 19th October 2020 and 15th October 2020. He was of the fact that the chargesheet indicated that the offence was committed on 19th September 2020. According to the appellant, the chargesheet was not amended according to section 234(1) of the CPA. The appellant cited the case of **Mohammed Kaningo Versu Republic** (1980) TLR279, where it was held that the prosecution must file the charge correctly. He also noted the decision in the case of **Kassim Arim @ Mbawal Versus Republic**, Criminal Appeal No. 607 of 2021(Unreported), where the court held that the prosecution has to prove that the dates when the offence is committed are established and supported by the evidence and not otherwise.

To the contrary, Ms, Nura Manja contended that the evidence adduced by PW1 was to the effect that 14th October 2020 was the day before communicating the act to his mother (PW2), who reported it to the Police on 15/10/2020. According to Ms. Nura, PW1 stated that he was sodomized four times, as illustrated in the Court Proceedings under paragraph 4. She submitted that PW5 only corroborated the evidence that PW1 was sodomized up to four times from 19th September 2020 to 14th October 2020. It was her further submission that PW4 proved that the penetration was more than once, all stipulated under pages 19, paragraph 3, and 14, paragraph 3 of the Court Proceedings. The State Attorney cited the case of **Issa Mwanjiku @ White Versus Republic**, Criminal Appeal No.175 of 2018**,** stating that variation of the dates in the Charge Sheet is not critical in proving the unnatural offence.

I have perused the trial court proceedings. What can be seen is that, indeed, the date of the commission of the offence on the charge sheet is 19th September 2020. PW1, who was the mother of the victim, testified to the effect that;

"Yohana ananiingizia dudu lake matakoni na naumia kwasbabu dudu lake ni kubwa nilimwambia aache lakini huwa haachi na mimi naumia"

PW1 proceeded that, on 15th October, 2020, at around 19:00hrs, the victim (PW2) told her that the appellant had sodomized the victim on the previous day, meaning on 14th October 2020. And on the same date, she reported the incident at the Osterbay Police police station. The victim, PW2, testified on page 10 of the proceedings that he was sodomized three times, the fourth time he managed to escape. All acts were done on the sofa couch and Dada's bedroom.

It is true that the victim only narrated the surrounding circumstances of how he was sodomized. He never mentioned any specific date of the incident. PW3 testified that the incident was reported on 15th October 2020 at Osterbay Police Station by PW1 and PW2. The appellant was arrested on the same day. PW4 is a medical doctor. He testified that, on 15th October 2020, he examined PW2, whom his mother accompanied. When tested with fingers, the victim felt pain, penetration, and bruises in his anus. Sphincter muscles were loose. PW5 was an investigator. In his investigation, the

offense was committed on 14th October 2020, but for the first time, sodomy was committed by the appellant on 19th September 2020.

According to him, the accused person has been sodomized three to four times, but he does not remember an exact number of events. He also recorded the cautioned statement of the appellant on 15th October 2020. The same was tendered as Exhibit PE 3 without objection.

I think the learned State Attorney was correct in stating that PW5 only corroborated the evidence of PW1 that he was sodomized up to four times from 19th September 2020 to 14th October 2020. The discrepancies in dates and the chargesheet alleged do not exist, or if there are, do not go to the root of the case. PW1, PW3, and PW4 only discussed the incident of 14th October 2020. His gap (PW2) in terms of dates is filled in by an investigator, whose findings revealed that the sodomy against the victim was committed three to four times, and it started on 19th September 2020. This ground of appeal also lacks merits.

The third ground of appeal is regarding the lack of proper evaluation and analysis of the evidence. The appellant is challenging the evidence of PW1 that even if he was a donkey, he could not have sodomized the victim

the whole day. In his own words, I quote ***"ata kama mrufani angekuwa punda asingeweza kumlawiti mtu siku nzima".*** He also argued that on 14 October 2020, PW1 claimed PW2 was sodomized the entire day and never existed in Tanzania. It was his submission that the case was fabricated for him because he refused to have sex with the PW1. According to him, the trial magistrate would have tried to find out whether the days mentioned that the appellant committed the offence, Tuesday, Thursday, and Saturday, match the date of 14th October 2020. According to the appellant, 14th October 2020 was Wednesday, as opposed to the victim's testimonies that the appellant used to sodomize him on Saturday only. Also, he submitted that PW4 confirmed that the victim was not sodomized that particular day.

On the other hand, Ms. Nura contended that the judgment of the trial magistrate shows that the trial judge analyzed the prosecution case and defence evidence and concluded that the prosecution proved their case beyond a reasonable doubt. The State Attorney cited the case of **Leonard Mwanashoka vs. Republic Criminal appeal No.226 of 2014 (unreported),** where it was held that:

> ***"...it is one thing to summarise the evidence for both sides separately and another to subject the entire evidence to an***

objective evaluation to separate the chaff from the grain. It is one thing to consider the evidence and then disregard it after proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation of analysis."

In light of the trial court's Judgment, the trial magistrate pointed out the following: **One,** he started analyzing the ingredients of the offense within which the appellant was charged. Then, he was satisfied with the age of the victim. He studied the appellant's defense, stating that it was an afterthought because he never cross-examined PW1 on his allegation that the case was fabricated after he refused PW1's sexual advances.

Indeed, there was no analysis made in the trial court's judgment as to why he concluded that the prosecution had proven its case beyond a reasonable doubt. The trial court only summarized the evidence and highlighted the appellant's defense. Proof of the trial was left unattended. As rightly contended by Ms. Nura and her observation in the cited case of **Leonard Mwanashoka vs. Republic Criminal**(supra), it is one thing to summarise the evidence for both sides separately and another thing to subject the entire proof to an objective evaluation to separate the chaff from

the grain. In this case, there was no proper scrutiny or assessment of the prosecution evidence.

What, then, should be done in the circumstances? The court can invoke its powers to step into the shoes of the trial court and do what it omitted to do, which was done in the case of **Karimu Jamary @ Kesi V Republic** Criminal Appeal No. 412 of 2018 Court of Appeal of Tanzania at Dar es Salaam (unreported) whereby the court was having regard to its previous decisions in **Joseph Leonard Manyota Versus R**, Criminal Appeal No. 485 of 2015 (unreported) and **Julius Joseph Versus R**, Criminal Appeal No.3 of 2017 (unreported).

In my analysis, the victim (PW2) testified that he was sodomized by the appellant three times and managed to escape the fourth time. When he was cross-examined by the appellant on page 10 of the proceedings, he insisted that the appellant sodomized him. In his own words, he said:

> ***"It is true you are the one who sodomized me, "Ni wewe hapo." You sodomized me four (4) times. I managed to run away once. I know you forced me" Sikukubali kufanya il ni wewe ulinifanyia kwa lazima...on the fourth time, on Nyerere***

day, you succeeded in sodomizing me in Dada's bedroom. That is when it was painful, and I told my mom."

With the above evidence, I do not find why the victim, PW2, should not be believed. In my view, PW2 told nothing but the truth. PW3 testified that PW1 reported the incident the following day, 15th October 2020. The victim was examined on the same day by PW4, where the report revealed that a blunt object penetrated the victim. It was also revealed that there were bruises on the inner part of the anus. During cross-examination, he contended that sphincter muscles were loose, and when he touched his anus, he screamed in pain. PW2 testified that he was penetrated three times.

On the fourth ground of appeal, the appellant claims that the cautioned statement was unprocedural recorded. According to him, he was a layman, and he was not informed whether he had the right to object to the statement. Hence, it should be expunged from the record. On the other hand, Ms. Nura submitted that the appellant did not raise any objections when such a document was tendered in court. She submitted that Section 27 (1) of the Evidence Act (Cap 6 RE 2019) provides that the confessions to the police voluntarily prove the case against that person.

I have revisited the proceedings, particularly on page 20, where the prosecution tendered the appellant's cautioned statement and admitted in exhibit PE 3 without objection. The same was read out to the court. During cross-examination, the PW5 expressed his satisfaction that the appellant was very cooperative when the statement was recorded, so he made his word very easy. In the cautioned statement, the appellant is seen telling PW5 that the incident of sodomy against the victim started way back in September 2020. The argument that he failed to object to the statement because he is ignorant of the law does not hold water because, in law, being unaware of the law is not an excuse.

On his fifth and sixth grounds, the appellant challenges the evidence of PW4, PW1, and PW2. He contended that there is no link between the chargesheet and the evidence of PW4 and the medical examination report. The appellant said that the oral testimony of the medical doctor (PW4) brought ambiguity that the victim was not penetrated that particular day.

On the other hand, Ms. Nura submitted that it is an essential ingredient in sexual offenses, such as unnatural offences, to prove that there was penetration and that the appellant is the one who penetrated the anus of the victim. According to her, PW4, a medical doctor, proved before the court

that a blunt object penetrated the victim's anus, and he filled Pf3 to prove that victim's anus was penetrated. The State Attorney referred evidence of PW4 stating that there was no proof of penetration on that particular date, but there was proof of penetration as the sphincter muscles were loose. The State Attorney cited the case of **Goodluck Kyando Versus R (2006) TLR, 363,** whereby the court held that every witness is entitled to faith unless there is a good reason not to. It was her view that the testimony of PW1 and PW2 corroborated the evidence of PW4.

I think the learned State Attorney has a point. When PW4 stated that the victim was not penetrated that day, he meant he was not on 15th October 2020. However, evidence of PW1 PW2 was that he was raped on 14th October 2020, according to PW5. The victim was also penetrated on 19th September 2020.

On the Sixth Ground raised by the Appellant claims that the evidence of Pw1 and Pw2 are unreliable to ground the appellant's conviction. Basing **on Section 127(6) of the Evidence Act stipulates that:**

"where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or

a victim of the sexual offence, and may, after assessing the credibility of the evidence of the child of tender years as the case may be, the victim of a sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if, for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or victim of the sexual offence is telling nothing but the truth."

The learned state Attorney contended that There is no doubt that the provision of the law points to the reliable nature of the evidence produced by Pw2 before the Court to ground the appellant's conviction. The element of telling the truth by Pw2 is stipulated on page 8 of the Court Proceedings as Pw1 states "*ili watu wajue kwamba unasema ukweli." "Mungu anapenda tuseme ukweli" I promise to tell the Court the truth.* In the case of **Goodluck kyando v R (2006) TLR, 363** the court held that;

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

Based on that, Pw2 proved before the court that he was sodomized and that the appellant sodomized him. PW1 and PW4 corroborated the evidence that the appellant sodomized Pw2 and no one else. The evidence against the appellant was watertight.

In the last and final ground of appeal, the appellant submitted that the prosecution's case was not proved beyond a reasonable doubt. The learned State Attorney argued that it is a rule that the prosecution has the sole duty to prove beyond a shadow of a doubt that the offence was committed. The rule stems from the case of **Mgenda Paul and Another Versus Republic (1993 TLR 219,** as the Court held that;

> ***"For any case to be taken to have been proved beyond a reasonable doubt, its evidence must be strong against the accused person to leave a remote possibility in his favor which can easily be dismissed.".***

Through PW2, PW4, and cautioned statements, the prosecution side was required to prove the appellant's penetration of PW1's anus. Such a crucial part of the evidence was proven by the help of a medical doctor (Pw4) who conducted the medical examination authorized by the PF3 issued by the

police. And such evidence was corroborated by the victim, the crucial witness in testifying in such cases rooted in sexual offences.

Subsequently, both grounds of appeal have sailed through, and it is enough to dispose of this appeal.

As a result, I am confident that the appeal lacks merit. In that regard, the conviction and sentence of the trial court are upheld, and the appeal is, at this moment, dismissed.

Order accordingly.

H. R. MWANGA

JUDGE

30/08/2023

COURT: Judgment delivered in Chambers this 30th day of August 2023 in the presence of Mr. Emmanuel Maleko, learned Senior State Attorney, and the Appellant in person.

H. R. MWANGA

JUDGE

30/08/2023